IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 146

THE COLORADO ANTI-DISCRIMINATION COMMISSION and EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, and GEORGE O. CORY, as members of said Commission,
Petitioners,

vs.

CONTINENTAL AIR LINES, INC., Respondent.

BRIEF OF PETITIONERS

DUKE W. DUNBAR
Attorney General

FLOYD B. ECKMAN,
Assistant Attorney General

104 State Capitol
Denver 2, Colorado

Attorneys for Petitioners

SMITH-BROOKS PRINTING CO. • 2554 LARIMER ST. • DENVER 5, COLORADO

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BRIEF OF PETITIONERS

A. REFERENCE TO OPINIONS BELOW

The opinion sought to be reviewed is reported as The Colorado Anti-Discrimination Commission, et al. v. Continental Air Lines, Inc., (1962) .....Colo....., 368 P. (2d) 970. This opinion is not as yet reported in the official reports of the Colorado Supreme Court. (R. 288-314)

B. GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3), 62 Stat. 929, because the validity of the Colorado Anti-Discrimination Act of 1957 is questioned on the ground that its application to the hiring practices of an employer engaged in interstate commerce is repugnant to the Constitution of the United States.

C. CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED.

The constitutional provisions, treaties, statutes, ordinances and regulations which this case involves, together with their official citations are as follows:

1. Article I, Section 8, Clause 3 of the Constitution of the United States.

> "Powers of Congress — The Congress shall have power:
>
> > "(3) To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."

2. Section 4 of the Enabling Act of the State of Colorado (18 Stat. 474, Colorado Revised Statutes of 1953, Vol. 1, p. 273, at 238).

> "* * * *; Provided, that the constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except Indians not taxed, and not be repugnant to the constitution of the United States and the principles of the declaration of independence."

3. The Colorado Anti-Discrimination Act of 1957 (Session Laws of Colorado, 1957, p. 492-500, Colorado Revised Statutes of 1953, Vol. 8, Perm. Cum. Supp., pp. 1008-1013) in applicable parts.

"80-24-2. Definitions.—

"(5) * * * * 'Employer' shall mean the State of Colorado or any political subdivision or board, commission, department, institution or school district thereof and every other person employing six or more employees within the state; * * * *."

"80-24-6. Discriminatory and unfair employment practices.—

"(2) * * * * For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against, any person otherwise qualified because of race, creed, color, national origin or ancestry."

D. QUESTION PRESENTED FOR REVIEW

Does the Colorado Anti-Discrimination Act of 1957, which prohibits discrimination because of race in the hiring practices of the respondent, an interstate air carrier, conflict with the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States by being either an undue burden on interstate commerce or prohibit by the preemption of this field by the laws of the United States, namely the Railway Labor Act, the Civil Aeronautics Act of 1938, the Federal Aviation Program Act or federal executive orders.

E. STATEMENT OF THE CASE

Marlon D. Green was a captain in the United States Air Force serving as a pilot on a tour of duty in Japan when he became interested in becoming a commercial airline pilot. He sent letters to the major airlines seeking employment, but without success. Shortly after his return to the states in April, 1957, he applied for employment as a pilot with respondent, Continental Air Lines, Inc., hereinafter called Continental. (R. 34-35). Upon receipt of the letter of application, Continental advised Green it was not hiring pilots at that time, but would keep his application on file. (R. 35).

In June, 1957, Continental began recruiting for some fourteen or fifteen pilots. Continental at that time sent Green an invitation to come to Denver for an employment interview not knowing Green was a negro. (R. 36, 175). Green arrived in Denver on June 24, 1957 where he took and passed a link trainer and flight test administered by Continental (R. 38 - 44). Green and five other applicants were all considered for employment at about the same time by Continental. They were all found to be qualified (R. 124-125) but of the six applicants, Green had by far the greatest amount of flying experience, particularly in multi-engine planes, as is indicated by the following composite table:

	Total Hours	First Pilot	Co-Pilot	Multi Engine	
Green	3071:30	1838:15	778:45	2900:00	(R. 217, 192)
George	2100:53	1145:35	874:13	897:23	(R. 201, 220)
Stearns	1200:00	750:00	450:00	934:00	(R. 205, 220)
Bryant	1150:00	1160:00	—	5:00*	(R. 213, 221)
Dresser	1031:00	916:00	—	—	(R. 209, 221)
Cole	1000:00	900:00	100:00	200:00	(R. 197, 222)

* Acquired between June 25, 1957, when Green and Bryant were examined and July 1, 1957.

Mr. Harold Bell, Vice-President in charge of personnel for Continental admitted Green was a qualified pilot. (R. 114). Mr. Sorby, Manager of Employment and Employee Relations of Continental said of Mr. Green, "All you have to do, I think, is shake hands with the fellow and you realize you have a pretty good boy. He is very friendly. I have been impressed with him right along." (R. 154).

Four of the five who applied with Green were asked to enter Continental's training program in July, 1957 (R. 120) and the fifth was asked in September, 1957. (R. 127). Meanwhile in August, 1957, Continental hired ten other pilots. (R. 102). Green was never given an interview or a physical examination, nor was he asked to enter Continental's training program. Because of alleged bad publicity, Continental ceased to consider Green as an applicant after early August (1957) when an article appeared in a newspaper concerning Green and his legal action against various persons and companies. (R. 104, 183-185).

On August 13, 1957, Green filed a complaint with the Colorado Anti-Discrimination Commission (R. 1-2) and in its Answer Continental set up defenses of conflict with the commerce clause of the federal constitution, Article I, Section 8, and that the federal government had pre-empted the field. (R. 6). The Anti-Discrimination Commission held a hearing on the merits of the case on May 7, 8, 1958 (R. 7-223), and on December 19, 1958 the Commission entered its Findings of Fact, Conclusions of Law and Orders in the case. (R. 223-226). Continental was ordered to give Green the first opportunity to enroll in its next training class with a priority status of June 24, 1957 (R. 225-226). The Commission found "that the only reason that the complainant was not selected for the training school was because of his race." (R. 225)

Continental appealed the decision of the Commission to the District Court of Denver, Colorado. Again, Continental raised the constitutional questions. At the time, Green had his first opportunity to resort to the 1875 Enabling Act of the Congress of the United States, which he did in the Answer he filed. (R. 247) The District Court remanded the case to the Commission to make findings of fact as to whether Continental was engaged in interstate commerce, whether Continental was subject to the anti-discrimination statute, and whether the employment for which Green had applied actually involved interstate commerce. As a result the Commission entered a new decision and purported to vacate its original one. The District Court then held that such action rendered the complaint moot. Upon review in the Colorado Supreme Court by writ of error, *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.* (1960), 143 Colo. 590, 355 P. (2d) 83, the Supreme Court held the Commission was without power to withdraw its first decision and the second decision was void The District Court was directed to rule on the first decision of the Commission.

In the District Court in the proceedings which followed the parties entered into a stipulation that: (1) Continental was engaged in interstate commerce; (2) the Commission would find Continental was subject to the Colorado Anti-Discrimination Act of 1957; and (3) the job Green applied for involved interstate operations. (R. 256-257) After hearing arguments and the submission of written briefs, the District Court entered extensive Findings of Fact, Conclusions of Law, and Judgment as of January 7, 1961 (R. 257-286), holding that as applied to Continental the Anti-Discrimination Act was an unreasonable burden upon interstate commerce and hence invalid under the commerce

clause and that by the Railway Labor Act, the Civil Aeronautics Act, the federal executive orders, Congress had pre-empted the field.

Writ of Error was then brought to the Colorado Supreme Court, *Colorado Anti-Discrimination Commission, et. al. v. Continental Air Lines, Inc.* (1962), ...Colo....., 368 P. (2d) 970, which affirmed the trial court judgment on the ground that the Colorado statute offended the commerce clause. (R. 288-314)

Green and the Commission both applied for certiorari to this Court, the same being granted on October 8, 1962. (R. 314-316)

F. SUMMARY OF THE ARGUMENT

The Colorado supreme court failed to recognize that *Hall v. DeCuir,* (1877) 95 U.S. 485, which was decided in 1877, concerned a state anti-discrimination statute which did in fact create a burden upon interstate commerce at that time; but, that same statute today would not create such a burden. The court also refused to recognize that in the more recent cases where *Hall v. DeCuir,* supra, has been cited, the court was considering a discrimination statute—not an anti-discrimination statute. If the principle of *Hall v. DeCuir,* supra,—that a burden on interstate commerce must be found to exist before the law is unconstitutional—is properly applied in the case at bar to the Colorado Anti-Discrimination Act of 1957, the Act must be found to be constitutional because no burden on interstate commerce can be found to exist.

Also, none of the statutes or executive orders cited by

the trial court, and indirectly approved by the Colorado supreme court, support the conclusion that Congress has expressed a clear intent to preempt the field of anti-discrimination legislation relating to hiring practices of employers even though such employer is engaged in interstate commerce.

G. ARGUMENT

1. Statutes which allow discrimination by an interstate carrier are prohibited by the commerce clause of the federal constitution because they are a burden upon interstate commerce; but, an *anti-discrimination* statute does not create such a burden on or interfere with interstate commerce and is constitutional.

The crux of the opinion of the Colorado supreme court in the case at bar is found in the following conclusion which the court stated in its opinion at page 973 of 368 P. (2d) and (R. 294), to-wit:

> "Racial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States. ********, the opinions of the U. S. Supreme Court have established the rule."

As support for this conclusion, the court cited and relied heavily upon the case of *Hall v. DeCuir* (1877), 95 U. S. 485, 24 L. Ed. 547.

We submit that the foregoing conclusion expressed by our court is erroneous. Examination of the case cited

above, as well as other cases which are applicable, discloses that no such conclusion has been established as a matter of law. It is true that *Hall v. DeCuir*, supra, was a case concerning a Louisiana statue prohibiting discrimination against passengers because of race in the accommodations furnished to them on a boat which travelled on the Mississippi river. Therein, this court struck down that statue because it created an undue burden on interstate commerce. Our court must have believed that because the *Hall v. DeCuir*, supra, decision was cited in *Morgan v. Virginia* (1946) 328 U. S. 373 and in *Huron Portland Cement Company v. City of Detroit* (1960) 326 U. S. 440, it established the conclusion as stated by our court.

The reason for this erroneous conclusion is that the court failed to distinguish between discrimination statutes and anti-discrimination statutes as they pertain to interstate commerce and their present affect thereupon. Further, the court refused to acknowledge that *Hall v. DeCuir*, supra, "has been eroded and devitalized" and "has no vitality today", (R. 295) and 368 P. (2d) 970, 974. The court also misapprehended the guiding principles laid down in *Hall v. DeCuir*, supra, and erroneously applied the facts of that case rather than those principles.

The principles of *Hall v. DeCuir*, supra, if properly applied support our conclusion and position that an anti-discrimination statute of a state can presently be applied to an interstate air carrier without running afoul of the commerce clause of the federal constitution. The principles of *Hall v. DeCuir*, supra, to which we have reference are as follows:

"There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several States. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it; for, as has often been said, 'legislation may in a great variety of ways affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the constitution'.

• • • • • •

The line which separates the powers of the States from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved.

But we think it may safely be said that State legislation which seeks to impose a burden upon inter-state commerce or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. • • • • • • • • "

In summary, then, it can safely be said that a state anti-discrimination statute applicable to interstate carriers is not *per se* prohibited by the commerce clause. This court did not state in *Hall v. DeCuir*, supra, that anti-discrimination required of an interstate carrier is a subject which by its own nature becomes a "no man's land"

insofar as state legislation is concerned, as the Colorado supreme court has concluded. What *Hall v. DeCuir* stands for is that if the state legislation creates a *burden* on or *interfers directly* with interstate commerce, then, and only then, such legislation is prohibited.

With this thought in mind, let us reflect a bit about the facts and circumstances in existence when *Hall v. DeCuir* was decided which, at that time, caused this court to conclude such an anti-discrimination statute did create a burden on and interferred directly with interstate commerce. *Hall v. DeCuir*, supra, was decided in 1877. This was at a period in the history of our country when it was lawful for a negro to be discriminated against. In those days he couldn't sit where he wanted to, eat where he wanted to, or go to school where he desired. This court recognized then that the negro, although legally free, was faced with certain obstacles in being completely accepted by the white man's society. Certain privileges enjoyed by persons of the white race were not obtainable by a colored person, *Civil Rights Cases* (1883) 109 U. S. 3, 25. Because of these legal, economic, and sociological circumstances, the Louisiana anti-discrimination statute in 1877 did create an undue burden on interstate commerce because it would have required passengers to change their cabins as the boat moved from one state to the other, depending on whether the state allowed or prohibited racial discrimination.

In this regard it must be remembered that a state which authorized discrimination in 1877 was doing a permissible thing. This was before our present times which stem from the line of cases beginning with *Shelly v. Kramer* (1948) 334 U.S. 1, *Brown v. Board of Education*

(1954) 347 U.S. 483, and *Cooper v. Aaron*, (1958) 358 U.S. 1. Today, such state discriminatory acts, ordinances or practices directed at interstate commerce would not be tolerated, *Morgan v. Virginia*, supra, *Brown v. Board of Education*, supra, *Boynton v. Virginia*, (1960) 364 U. S. 454. Therefore, that which constituted a burden on or an interference with interstate commerce in 1877, is not necessarily a burden or an interference in today's commerce. As this court said, "It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved.", *Hall v. DeCuir*, supra.

We stated earlier in this brief that it appears our court misconstrued the reason for the citation of *Hall v. DeCuir*, supra, in later cases where discrimination statutes which affected interstate commerce were held to violate the commerce clause of the federal constitution by this court. By this statement, we have reference to the fact that in *Morgan v. Virginia*, supra, cited by the Colorado supreme court, the statute which was overthrown was a statute requiring segregation of negro passengers on busses travelling in interstate commerce which passed through Virginia. In Virginia such passengers were required to set in designated parts of the busses. This was clearly a burden on inte state commerce. In *Boynton v. Virginia*, supra, a state statute requiring negro passengers to eat in a segregated place at a bus terminal was overthrown as being a direct burden on interstate commerce. In addition to these two cases cited by our court there are other cases which fall into the same class. In all of these cases, the same pattern has evolved. The statute or ordinance concerned has required negro passengers to be segregated from the other passengers. Such

segregation, when applied to interstate carriers, under the present legal concepts as announced by this court, does, in fact, create an undue burden on and does directly interfere with interstate commerce just as much as the Louisiana statute did in 1877, which prohibited segregation of negro passengers.

But times, mores, customs, and legal concepts change. Today, it can't be categorically said that an anti-discrimination statute, *per se*, creates a burden on interstate commerce or interfers with its free flow. If one does so conclude, he must believe that it is still lawful to discriminate against negroes in matters pertaining to or connected with interstate commerce. He must completely disregard the holdings of this court as typified by the cases of *Morgan v. Virginia* and *Boynton v. Virginia*, supra. The fact that times change, that legal concepts change with the times, and that what was legal then may not be legal now, and vice-versa, is what our supreme court overlooked in relying primarily on *Hall v. DeCuir*, supra, as the foundation for its decision. *Hall v. DeCuir*, supra, is only applicable if a burden on interstate commerce is found to exist in the particular case under consid ation, not because it concerned an anti-discrimination statute. In this regard, our trial court made no finding whatsoever that any burden was created or imposed upon the interstate commerce of Continental. The trial court merely concluded that a "no man's land" existed and our supreme court affirmed the position taken by the trial court. Neither court applied the true doctrine of *Hall v. DeCuir*, supra,—that each case must be looked at from its own merits and a determination made as to whether or not a burden is imposed upon interstate commerce. This is the key—the finding of a burden on interstate commerce—which un-

locks the door for a holding that the statute is unconstitutional because it violates the commerce clause of the federal constitution. Our courts never found the key, so to speak. Therefore, they didn't have the authority to hold the Colorado Anti-Discrimination Act of 1957 to be unconstitutional as applied to an interstate carrier such as Continental.

But, we might ask ourselves, could the court have found an undue burden on or a direct interference with interstate commerce? We believe they could not have so found because no burden or restriction exists. In the first place we are herein concerned with a statute that prohibits discrimination in the hiring practices of an employer. A statute which applies alike to all employers of six or more employees, whether or not they are engaged in interstate commerce, Section 80-24-2 (5), Colorado Revised Statutes of 1953, Vol. 8, Perm. Supp. As Justice Frantz pointed out in his dissenting opinion found at 368 P. (2d) 975, 977 and R. 296-309, a contract of employment is of a local nature and subject to local laws even though the employer is engaged in the interstate transportation of passengers. Had Green been hired he would not have caused any more burden on interstate commerce than would a colored passenger riding on the same plane. In the hearing before the Commission it was alleged indirectly that some people might not ride on the airplane because a negro was flying the plane (R. 84) or that a possible lack of harmony might exist in the cockpit because of the difference in race between the pilot and co-pilot (R. 92, 115), but these statements were never substantiated by competent evidence. On the contrary, it seems probable that passengers would be no more concerned about riding in a plane piloted by a negro than

they would be if they were required to ride as a passenger with a negro passenger. In this regard we believe it is safe to assume that most passengers would prefer to ride with a competent and qualified pilot rather than be concerned with the fact that he was a negro.

In any event, this record is completely devoid of any facts which would indicate to the slightest degree that the Colorado Anti-Discrimination Act of 1957 places any scintilla of a burden or restriction upon the interstate commerce engaged in by Continental. If anything, this statute assures compliance and conformity with the national policy as announced by this court insofar as interstate commerce is concerned and the burdens and restrictions thereupon. Therefore since no burden has been shown or can be shown by the Colorado Anti-Discrimination statute, *Hall v. DeCuir*, supra, is not controlling and has no application whatsoever to this case.

Further, with respect to the fact that we are herein concerned with an anti-discrimination statute regulating hiring practices, we believe it is important to note that the enabling act of the state of Colorado, supra, as passed by the United States Congress, specifically requires that the Constitution of the State of Colorado make no discrimination in the civil rights because of race or color. Therefore, the Colorado Anti-Discrimination Act is only a legislative expression of the Congressional mandate that the right to seek employment in Colorado is not to be denied because of the race or color of the person seeking the employment. As we state above, employment contracts are of a local nature and are subject to and controlled by local law. When Colorado protected those employment rights for all its citizens and denied infringement of those rights because

of race or color, Colorado was acting as it was directed to do by Congress when it passed Colorado's enabling act.

Even though such legislative expression by the Colorado legislature might indirectly affect interstate commerce, this is not a sufficient reason for striking down the Colorado Anti-Discrimination Act. In support of this premise we cite from *Huron Portland Cement Company v. City of Detroit*, supra, at page 443 of 362 U. S., to-wit:

> "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce; ****** never intended to cut the States off from legislating on all subjects relating to health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the constitution."

Also, at page 448, the following:

> "It has not been suggested that the local ordinance, applicable alike to 'any person, firm or corporation' within the city, discriminates against interstate commerce as such. It is a regulation of general application, designed to better the health and welfare of the community. And while the appellant argues that other local governments might impose differing requirements as to air pollution, it has pointed to none. The record contains nothing to suggest the existence of any such competing or conflicting local regulations. *Bibb v. Navajo Freight Lines*, 359 U. S. 520. We con-

clude that no impermissible burden on commerce has been shown."

In the preceding argument we have shown why the Colorado Supreme Court was wrong in its basic premise by relying on *Hall v. DeCuir*, supra, to support its opinion. Now let us look to the other side of the problem. Here we find that although this court has not squarely stated what we believe to be true—that an anti-discrimination state statute which prohibits discrimination because of race by an employer in his hiring practices, be he involved in inter-state or intra-state commerce, does not violate the commerce clause of the federal constitution—this court has decided cases which indicate this premise to be valid.

One of the most important cases in this respect is that of *Railway Mail Association v. Corsi* (1945) 326 U. S. 88. In this case the argument was raised that the New York Anti-Discrimination Law, Section 43 of the New York Civil Rights Law, which prohibited denial of membership in a labor organization because of race or color, conflicted with Article I, Section 8, Clause 7 of the federal constitution, the clause giving congress power over the post offices and the post roads. This power is almost identical to the power granted by clause 3 over commerce. In rejecting this argument, this court said, at page 95, the following:

"* * *. Section 43 does not impinge on the federal mail service or the power of the government to conduct it. It does not burden the government in its selection of its employees or in its relations with them. * * *. The decided cases which indicate the limits of state regulatory power in relation to the federal mail service involve situations where state regulation in

volved a direct, physical interference with federal activities under the postal power or some direct immediate burden on the performance of the postal functions. (cases cited) And in at least one instance this court has sustained direct state interference with transmission of the mails where the slight public inconvenience arising therefrom was felt to be far outweighed by inconvenience to a state in the enforcement of its laws which would have resulted from a contrary holding. *United States v. Kimley*, 7 Wall. 482, 486."

The foregoing principle is particularly applicable to the case at bar. In *Corsi*, supra, the Constitutional provision concerns authority of Congress to regulate postoffices. Herein, we are concerned with the power of Congress to regulate interstate commerce. Surely, if the state of New York can constitutionally legislate and by such legislation control the membership practices of the postoffice employees' organization, Colorado can legislate and control the hiring practices of an employer, even if an employer (Continental) is engaged in interstate commerce.

A later case which also indicates such legislation is constitutionally permissible is that of *Bob-Lo Excursion Co. v. Michigan* (1948) 333 U. S. 28. This case involved a Michigan civil right statute which guaranteed all persons within the jurisdiction of Michigan equal treatment in public places or facilities. When a colored person attempted to ride a boat owned by Bob-Lo the person was refused passage. Later a criminal action was brought against appellant, Bob-Lo, who was found guilty. The Supreme Court of Michigan affirmed rejecting appellants' arguments that the statute violated the commerce clause of the federal constitution. We think this court in rendering its

opinion therein made a comment on page 40 thereof, which is particularly applicable to the case at bar, to-wit:

> "* * * Certainly there is no national interest which overrides interest of Michigan to forbid the type of discrimination practiced here."

Nothing could be said that would be more true of the case at bar. There is nothing in our national policy that would prohibit the discrimination (anti-discrimination) practiced by Colorado in its Anti-Discrimination Act of 1957.

2. There are no legislative enactments which indicate a clear intent on the part of Congress to pre-empt the field of anti-discrimination in employment practices of air carriers operating in interstate commerce.

Since 1942 there has been some kind of fair employment legislation introduced in each Congress. These bills generally have contained provisions prohibiting discrimination in employment because of race or color and they would have been applicable to an employer engaged in interstate commerce. None of these bills were enacted into law. Had such been done, undoubtedly, this case would not now be before this court. However, absent such federal legislation in this area, the proposition that the field has been preempted by Congress or by executive order is baseless.

Although the Colorado supreme court did not expressly state that its opinion was founded upon the premise that the field had been preempted, it can be inferred such is the case. Such conclusion is founded upon the fact that

the trial court dwelt at length on this proposition in its decision. When this was reviewed, the supreme court in its opinion said, "The findings, conclusions and judgment of the trial court might well be adopted in toto as the opinion of the court.", 368 P. (2d) 973, R. 293.

The trial court relied upon three federal laws as the basis for its conclusion, stated on page 274 of the record, as follows:

> "By virtue of any one of several federal statutes and regulatory systems an interstate air carrier is prohibited from racial discrimination. As to those employers, federal legislation pre-empts the field."

The three laws are: (1) The Railway Labor Act, 45 U.S.C., Secs. 151, 181, *et seq;* (2) The Civil Aeronautics Act, 49 U.S.C., Secs. 401, *et seq* (now the Federal Aviation Program Act, 49 U.S.C., Secs. 1301, *et seq*); and (3) The Interstate Commerce Act, 49 U.S.C., Secs. 1, 301, 901, 1001, *et seq.*

The Railway Labor Act cannot be said to be applicable to the hiring practices of an airline because this is not one of the enumerated purposes of the act, found in Section 151a, 49 U.S.C., which reads as follows:

> "The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-

organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. May 20, 1926, c. 347, §2, 44 Stat. 577; June 21, 1934, c. 691, §2, 48 Stat. 1186."

Cases which have arisen under this act and relied upon by the trial court, and indirectly by the supreme court, have for the great part been concerned with labor organizations and that they represent all employees equally, without regard to race or color, *Steele v. Louisville* and *Nashville R. R. Co.* (1944) 323 U.S. 192; *Brotherhood of R. R. Trainmen v. Howard* (1952) 343 U.S. 768; and *Conley v. Gibson* (1957) 355 U.S. 41. However, the results of these cases do not transform the Railway Labor Act into a federal Fair Employment Practices Act for rail and air carriers.

A second facet of this premise is that the Civil Aeronautics Act, supra, was found by the trial court to be applicable and to be a preemption of the field by Congress. Examination of the purposes of this Act does not disclose anything that would indicate the Act was intended to cover discrimination in hiring practices. The only "discrimination" mentioned in the Act is "discrimination" in service provided to customers. Section 402(c) of 49 U.S.C. spells out the over-all policy of the Act as "the promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages or unfair or destructive

competitive practices." Section 484, thereof, expressly describes the kinds of discrimination to which Section 402(c), supra, refers. It is declared that:

> "'No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Clearly, the discrimination therein expressed is limited to discrimination in service or gainst passengers.

The trial court also mentioned Sections 551-560 of the Act, 49 U.S.C. These sections are found under Sub-chapter VI, entitled "Civil Aeronautics Safety Regulations." It is quite apparent that sections under this heading would have no application to racial discrimination in the hiring practices of an interstate air carrier.

With respect to the cases cited by the trial court which concerned the Civil Aeronautics Act, none were concerned with employment practices of an air carrier. Therefore, there is absolutely nothing upon which a foundation can be laid to support the conclusion that by enacting the Civil Aeronautics Act, Congress intended to preempt the field of anti-discrimination in the hiring practices of an interstate air carrier.

All that has been said hereinbefore about the Railway Labor Act and the Civil Aeronautics Act—that they do

not indicate an intention on the part of Congress to preempt the field of preventing discrimination in the hiring practices of air carriers — can also be said of the Interstate Commerce Act or any cases cited in relation thereto by the trial court.

H. CONCLUSION

The foundation of the opinion of the Colorado supreme court in this case is built entirely upon the case of *Hall v. DeCuir*, supra. If this case fails under an attack upon it; then, likewise, the Colorado decision must also fail.

We believe that it has been conclusively shown herein that *Hall v. DeCuir*, supra, does not establish that a state anti-discrimination statute regulating hiring practices is unconstitutional, *per se*, even though it is applied to an interstate air carrier because this is not a "no man's land" for state legislation, as the Colorado supreme court would lead one to believe.

Hall v. DeCuir stands for the principle that if a burden or interference is imposed upon interstate commerce, then, and only then, will the state law be held to be unconstitutional. Here no burden or interference was found to exist. Nor can any be found to exist. As a result the reasoning of the Colorado supreme court is unsound and its opinion erroneous.

In addition, neither the Railway Labor Act, the Civil Aeronautics Act, the Interstate Commerce Act, or federal executive orders indicate any attempt by the federal government to preempt this field.

Therefore, the opinion of the Colorado supreme court must be reversed and the orders of the Anti-Discrimination Commission of Colorado be affirmed (R. 225-226). Further, this court is requested to enter any other and additional orders and judgments deemed just and equitable to the respondent, Marlon D. Green, to protect his interests in these premises.

Respectfully submitted,

DUKE W. DUNBAR
Attorney General

FLOYD B. ENGEMAN,
Assistant Attorney General

104 State Capitol
Denver 2, Colorado

Attorneys for Petitioners